"Q. Tell us, in your own words what happened at 221 Fife Lane, October 19, 1961, at approximately 5:15 P.M.

"A. About 5:00 P.M. I went by Ann's house and she let me in the front door. Ruth came up and came in the house. She sat down in the big chair in the living room in front of the window. I went to the bathroom and came out and stood by the front door. Ann was either standing or sitting at the desk by the door.

"I pulled the pistol from my hip pocket and started shooting. A bullet hit Ruth first and Ann run into the bedroom and grabbed the phone and I pulled her away from the phone. She ran back into the front room and I started shooting again, but I don't know how many times I shot.

"Ann ran for the front door when I was shooting and I pulled her away from the front door and I shot her then. After I shot her, I turned around and shot again. I don't know if it was Ruth or Ann. Then I walked over to Ruth and I raped her and I walked over to Ann, turned her over. She was laying sideways and opened her eye up. She was trembling then. I might have pulled her clothes down but I didn't rape the girl.

"I called the police operator and I came back and put Ruth in my arms and carried her to DePaul Hospital. I carried her in and laid her on the stretcher. I got in the car and came back to Ann's house. I walked up to the motorcycle officer and handed him the keys and the next thing I was in the police car.

"Q. Jay, you were treated for overdose of sleeping pills. Tell us when you took them.

"A. After I realized what I had done, I wanted to die and I took the pills.

"Q. Where did you get the pills?

"A. I had them with me when I went there.

"Q. How much had you had to drink?

"A. Part of a pint of whiskey and four or five beers.

"Q. What time did you quit work?

"A. About 4:00.

"Q. You refer to Ann. Do you mean Ann Bannon?

"A. Yes, sir.

"Q. You refer to Ruth in your statement. Do you mean Ruth Davis Lewis?

"A. Ruth Davis. I don't know her last name.

"Q. Where did you get the gun?

"A. Ben Williams, second house past Princess Anne Road on Chapel Street.

"Q. How long had you had it?

"A. About one day.

"Q. How much did you pay for it?

"A. I borrowed it from him. I had borrowed it before because I carried a good bit of money at times and my gun had been stolen at Virginia Beach.

"Q. I show you a 32 calibre automatic Serial No. 898294. This is the gun used on Ann and Ruth?

"A. Yes.

"Q. How long have you known Ann?

"A. Twenty years. We growed up together in Berlin, Maryland, along with Ruth.

"Q. What did Ruth say to you before you raped her?

"A. Nothing that I recall.

"Q. Are you comfortable at this time?

"A. You are treating me all right.

"Q. Why did you go to Ann's house?

"A. I don't know. I just went there. I knew her father and mother and I had been there several times before.

"Q. Had you had intercourse with Ann?

"A. No, sir.

"Q. Had you had intercourse with Ruth before this happened?

"A. No, sir.

"Q. Is this statement the truth to the best of your knowledge and belief and given freely without threat or promise by us or any member of the Norfolk Police Division?

"A. That's right.

"Q. Anything else you care to say?

"A. That's all, I guess. I want to die. I ain't got nothing to live for."

The defendant introduced two psychiatrists as witnesses. Dr. Dietrich Heyder, who examined the defendant about 11:00 a.m. the day after the crime, said, in part: "It could be observed that this man was at the time in practically perfect mental health and there was no disturbance of the mental status." The other psychiatrist, Dr. Robert H. Thrasher, was of opinion that defendant was in a psychotic state on the day of the crime, and that he "wouldn't trust" the defendant not to kill Ann Bannon again if she were living, and that the same applied also to other persons. He further said that he had a "sick, mixed up mind," and that, "Even the stress of normal living outside may bring out his hostile, aggressive impulses."

In rebuttal, Dr. Joseph R. Blalock, Superintendent of the Southwestern State Hospital, testified that from his observation of the defendant, the defendant knew the difference between right and wrong and could adhere to the right. Dr. Charles Nemeth, who had made a closer examination and observation of the defendant at the State Hospital, said he found the patient neither psychotic nor insane, and that he knew the difference between right and wrong.

The evidence shows that the murder weapon, a 32 calibre pistol, was apparently stolen from H. C. Divers, the owner, between the latter part of September, 1961, and the day of the murder.

On the afternoon of the murder, Mrs. Mary Ballard, who lives on Fife Lane about four doors from the residence of Mrs. Ann Bannon, observed a blue Jeep stationwagon, with "Virginia Lee Hotel" written on it, circling around the block where she lived between 3:30 and 4:30 p.m. Timmons was shown to have had such a wagon in his custody.

Police Detective Fred Henley testified that he took the defendant into custody about 6:00 p.m. on October 19, at Mrs. Bannon's home; that Timmons appeared to be in "a subdued, quiet condition," talked coherently, was sober, and there was nothing unusual in his behavior or manner. The officer in examining the body and clothing of Timmons found "red smears that indicated them to be blood" on the fly of his trousers. He asked the defendant if he had shot a person. Timmons replied, saying he had not shot a woman; that he had driven to a house with another man; that that man got out of the car and went into the house; and he, the defendant, drove off. He then stated that he returned to the house and found the police officer there, and was arrested; and that he did not know at that time why he was arrested. Asked who the other man was, the defendant said that his name was "Mike."

On the same evening Timmons told the nurse who met him at the hospital where he took Mrs. Lewis, that "I shot her accidentally, I shot two of them," and told Police Officer H. D. Suggs that: "The gun went off, it was an accident, the gun went off four times." Later asked what happened, he replied: "I am trying to do a favor for someone, and I am not saying any more." While in jail he wrote to his sister saying: "I know that I have done wrong, and I am going to fight until I die."

The defendant did not take the witness stand. The record shows that he knew both Mrs. Lewis and Mrs. Bannon. All three were natives of Maryland, and Timmons, had, in his younger years, gone to the same school in Berlin, Maryland, then attended by the two women. Mrs. Lewis had seen Timmons only about three times in the ten years preceding October, 1961. Timmons, twenty-four years of age, stopped school at the age of sixteen, and obtained employment with a racing establishment in Maryland. There is evidence that he had suffered from "a nervous condition" for which his physician had had him committed to a Maryland state mental hospital on June 20, 1959. He was allowed to return home in August, 1959; but was readmitted to the hospital in November of the same year. On December 23, 1959, he was paroled in the custody of his mother, and in April, 1960, he obtained a discharge from the hospital, and thereafter came to Virginia Beach and obtained employment with the parents of Ann Bannon, Mr. and Mrs. Ayers, the latter owning or operating the Virginia Lee Hotel at Virginia Beach.

On October 20, Timmons was admitted to the Norfolk General Hospital for observation as to his mental condition and treated for an overdose of sleeping pills. On October 25, 1961, he was ordered by the trial court to be delivered to the Superintendent of the Southwestern State Hospital at Marion, Virginia, for proper care and observation, and for a detailed report of his mental condition as of October 19, 1961, and all other days subsequent thereto, pursuant to Title 19.1-228, Code of Virginia, Rep. Vol. 1960.

The Superintendent of the Southwestern State Hospital and Dr. Charles Nemeth, its clinical director, reported to the court that Timmons was "considered to be mentally competent and able to testify in his own defense." They further stated that they found nothing in the history of his behavior in jail from October 28, 1961, "indicating the presence

of any psychosis," and in their opinion, Timmons, "was during this whole period, without psychosis and was mentally competent" to stand trial.

On February 1, 1962, at the request of the defendant the court appointed William H. Sands, "a competent and experienced attorney" as counsel for the defendant. On February 6, 1962, four other indictments were found against Timmons: one for malicious shooting with intent to maim, disfigure, disable and kill Ruth Lewis; two for committing rape on Ruth Lewis; and one for committing rape upon Ann Bannon.

The trial of this case was continued from time to time upon motion of the defendant, and was held on April 17 and 18, 1962. The court gave eight instructions to the jury at the request of the Commonwealth and twelve instructions at the request of the defendant. Eight of the instructions granted on behalf of the defendant related to the issue of his sanity. Another told the jury that should the defendant be found guilty, his punishment "must be based solely upon the killing for which he is being tried without considering other alleged offenses." Defendant objected to only two of the Commonwealth's instructions, C-3, which told the jury that murder in the commission of, or attempt to commit rape is murder of the first degree, and Instruction C-4, which defined the offense of rape. No grounds were assigned for either objection, nor exceptions taken to the granting of the instructions.

The record shows that counsel appointed by the court to represent defendant vigorously stressed before the jury the actions of Timmons at the home of Mrs. Bannon to support the theory that defendant was insane at the time of the killing. No objection was made to the details recited by Mrs. Lewis; and, on the other hand, she was cross-examined at great length as to them. There was no objection made to

any of the other evidence, except as to the admission of the photographs showing the body of Mrs. Bannon. Defendant's counsel sought in his cross-examination of the witnesses to bring out the enormity of the shocking nature of the acts of the defendant. In his argument to the jury, he referred to them as showing "a most unusual situation, a most abnormal situation, not a situation that you or I have any right to expect from any normal human being." He said they disclosed "a picture of a mad dog running wild," and "(T)hat is exactly what it was and the Commonwealth's Attorney himself brought it out to you." He asked that Timmons be found not guilty by reason of insanity; but if the jury did not believe him to be insane, under the instructions of the court, that a death sentence be not imposed upon him, but he be sent to a hospital or penitentiary for treatment.

The motion, in the trial court, for a new trial was argued by counsel of defendant's own choosing, his present counsel, who succeeded counsel appointed by the court. Upon appeal, he assigns error: (1) to the verdict of the jury as contrary to the law and the evidence; (2) to the admission of the photographs and "slides" of the body of the deceased; (3) to the admission of evidence relating to the rapes of Mrs. Lewis; (4) to the "failure of the court to properly instruct the jury;" and (5) to "improper argument" of the Commonwealth's Attorney. Error assigned to the exclusion of evidence has been abandoned.

[1] The assignments will be considered in the order above mentioned. On the first assignment, it is admitted in the brief of the defendant that the burden was on him to establish to the satisfaction of the jury that he was mentally incompetent at the time of the shooting of Ann Bannon. Counsel, however, recognizes that this question has been resolved against him, and although he asserts that the jury might have reached a different conclusion, he admits that

the verdict is binding on him. In view of this admission, it is unnecessary that we further deal with the facts relating to the issue of insanity.

Much of the brief and argument of the defendant is based on his contention that the admission of the photographs of the body of Mrs. Bannon and testimony as to the rapes of Mrs. Lewis tended to inflame the jury to his prejudice, in support of his second and third assignments of error.

The theory of the Commonwealth was that the defendant was guilty of either a willful, deliberate, and premeditated killing, or a killing in the commission of, or attempt to commit rape. Code, § 18.1-21.*

[2] The killing of Mrs. Bannon by the defendant is uncontradicted and the guilty agent is not in question. In view of that there arose the presumption that defendant was guilty of murder of the second degree, and the burden of proving the elements necessary to elevate the crime to murder in the first degree was upon the Commonwealth. *Henry* v. *Commonwealth,* 195 Va. 281, 289, 77 S.E.2d 863.

The Commonwealth sought to show that the motive under either of its theories was rape. Here, as in the case of *Martin* v. *Commonwealth,* 184 Va. 1009, 37 S.E.2d 43, the defendant contended that since it had been shown that a person had died of a wound inflicted by the discharge of a pistol in the hands of an accused, admission of photographs showing the body of the victim, was surplusage, which inflamed the jury.

In answer to that contention we said in *Martin* v. *Commonwealth, supra,* 184 Va., page 1022, 37 S.E.2d, page 49:

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* § 18.1-21 "Murder by poison, lying in wait, imprisonment, starving, or by any wilful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, robbery or burglary is murder of the first degree. All other murder is murder of the second degree."

"Objects connected with crime are often offered in evidence in criminal cases when related to issues in the case. An authentic photograph shows no more than would be disclosed by a view of the object itself. It may give a more accurate description of the appearance, nature and condition of the object than a mere verbal description dependent upon memory. The picture of the wounded body of a man in the repose of death should excite no more sympathy or prejudice than the exhibition of a living person with a bruised, broken and torn body.

"The manner in which Martin was shot, the distance from which he was shot, and where the shot entered his body were relevant and material to the issue."

We there further said that: "It did not lie in the power of the defendant, by this general admission or confession to prevent the state from proving all the facts, and thereby present to the jury the picture of the entire transaction relied on for conviction. Doubtless there are many cases where courts should and do preclude proof upon the admission of essential facts, but rarely where the intent or motive is involved, and may be inferred from such proof. (citations)' " 184 Va., page 1023, 37 S.E.2d, page 49.

See also *Enoch* v. *Commonwealth,* 141 Va. 411, 437, 438, 126 S.E. 222; *Newberry* v. *Commonwealth,* 191 Va. 445, 61 S.E.2d 318, and annotation, "Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death," 73 A.L.R.2d 769, wherein a multitude of cases are reviewed, including the two Virginia cases above cited.

[3] The photographs of the victim were relevant to show the degree of atrociousness of the crime, or the malice with which it was committed. The state of disarray of the deceased's clothes shed light on the motive and intent of the defendant, as revealed in his contemporaneous acts. The photographs clearly and simply show more than any wit-

ness, save defendant, actually saw at the time of the killing. The question of their admissibility was one resting in the sound discretion of the trial court. *Enoch* v. *Commonwealth, supra,* 141 Va. 438, 126 S.E. 230.

[4] There is no merit in the contention that it was error to permit Mrs. Lewis to testify as to the rapes upon her. There was no exception to her testimony and the vigorous and persistent cross-examination of her shows that the defendant sought to magnify the depravity and brutality of his acts to give substance to the argument that he was insane. While there has been no compliance with Rule of Court 1:8, it is also clear that defendant by his cross-examination waived his right to object to her testimony, even if he had saved the point. The killing and the rapes all occurred within a few minutes. The offenses were so closely connected and interwoven as to be a continuous series of acts tending to show the intention and motive of the defendant. It is impossible to separate them and get a complete view of the whole case and the reasons therefor. *Compton* v. *Commonwealth,* 190 Va. 48, 55, 55 S.E.2d 446.

Furthermore, the court expressly instructed the jury that should they find the defendant guilty, that the punishment to be fixed by them "must be based solely on the killing for which he is being tried without considering other alleged offenses."

[5] Generally speaking, it is not proper on the trial of a criminal case to admit testimony of a prior independent crime; but there is an exception to the rule as well established as the rule itself that such testimony is admissible where it shows motive, intent or is related to or connected with or leads up to the offense for which the accused is on trial. *Colvin* v. *Commonwealth,* 147 Va. 663, 669, 670, 137 S.E. 476.

This is not a situation involving a prior offense unrelated to the act for which the defendant was being tried. The rapes upon Ruth Lewis were important links in the chain of evidence. *Day* v. *Commonwealth,* 196 Va. 907, 914, 86 S.E.2d 23; *Compton* v. *Commonwealth,* 190 Va. 48, 55, 55 S.E.2d 446; *Huffman* v. *Commonwealth,* 168 Va. 668, 682, 190 S.E. 265; 7 Michie's Jur., Evidence, §§ 47 and 48, pages 389 et seq.

Also see *Williams* v. *Commonwealth,* 203 Va. 837, 841, 127 S.E.2d 423; and *Rees* v. *Commonwealth,* 203 Va. 850, 868, 127 S.E.2d 406, where many cases dealing with the Virginia rule and its exceptions are reviewed.

[6] There is no merit in the assignment that the court failed to properly instruct the jury. While Instructions C-3 and C-4 were objected to, there were no exceptions taken to either of them, nor do the assignments of error point out, under Rule of Court 1:8, the grounds of objection or the vice in the instructions. *Harlow* v. *Commonwealth,* 195 Va. 269, 271, 272, 77 S.E.2d 851. We find no error in the giving of Instructions C-3 and C-4, since C-3 merely instructs the jury that "murder in the commission of, or attempt to commit rape is murder of the first degree," and C-4 merely defines what constitutes the crime of rape.

We come next to the assignment that the Commonwealth's Attorney was guilty of improper argument. It is pointed out that the Commonwealth's Attorney made several statements, the general tenor of which related to the depravity and atrociousness of defendant's acts on October 19, 1961, and the probability that he would commit criminal acts in the future, if he should be released from restraint. It is urged that such argument was prejudicial error because calculated to cause the jury to "speculate" as to what might happen after the verdict, and *Jones* v. *Commonwealth,* 194 Va. 273, 72 S.E.2d 693, 35 A.L.R.2d 761 and *Coward* v.

Commonwealth, 164 Va. 639, 178 S.E. 797 are cited in support. The facts in the cited cases are unlike those here. There the court, in response to a question from a juror as to whether a sentence imposed by them might be thereafter reduced, stated that it was the duty of the jury to fix the punishment within the limits prescribed by law, without consideration as to what might be done thereafter to reduce the measure of that punishment. Here, the Commonwealth's Attorney was not referring to what might happen with respect to changing the measure of punishment imposed upon the defendant; but as to what might happen if the defendant were turned loose on the public, having in mind the propensities attributed to him by Dr. Thrasher, a witness for the defendant, who said that Timmons had such a diseased mind that "the stress of normal living outside may bring out his hostile, aggressive impulses," and also stressed in the argument of his counsel.

There was not a single objection in the trial court to the argument of the Commonwealth's Attorney, nor a motion for a mistrial because of it. Moreover, the remarks were invited and provoked by the argument of counsel for the accused, in support of his theory that the enormity of the offenses supported the plea of insanity. Defendant's counsel may have thought the remarks supported his theory and did not desire to bring them to a stop, or to ask that the jury be instructed to disregard them.

[7] We do not approve of counsel attempting to go outside the evidence; but he has a right to combat the argument of the defendant's counsel and to refer to the evidence and fair inferences from it, as the Commonwealth's Attorney here did, both with respect to the guilt of the accused and a proper measure of punishment. *Jackson* v. *Commonwealth,* 193 Va. 664, 675, 676, 70 S.E.2d 322; *Hubbard* v. *Commonwealth,* 190 Va. 917, 931, 932, 59 S.E.2d 102.

The trial judge, in the exercise of his discretion, evidently saw no impropriety in the remarks, and having the opportunity to observe the whole situation and attending circumstances, concluded that defendant had a fair and impartial trial. While the remarks of the Attorney for the Commonwealth were strong and vigorous, they were based on a situation which confronted him, and we do not think there was any transgression sufficient to classify it as an error warranting reversal under the circumstances of this case.

[8] The defendant was represented by able and competent counsel both in the trial court and in this Court. In the trial court, it was sought to show that he was insane, and much of the evidence, as we have seen, was brought out in answer to questions propounded by defendant's counsel, and admitted on that issue. He cannot be allowed to take advantage of his claim in the trial court that evidence of his condition at the time of the killing showed that he was insane, and now on appeal be permitted to successfully contend that the admission of such evidence was erroneous and prejudicial to him. *McMillan* v. *Commonwealth,* 188 Va. 429, 432, 50 S.E.2d 428; 1 M.J., Appeal and Error, §§ 253 and 254, pages 669 et seq.; 5 M.J., Criminal Procedure, § 42, page 373.

After examining all of the assignments of error, the whole case in its trial setting and full context, and taking into consideration the contentions of the defendant during the progress of his trial, we conclude that a reversal of the judgment is not warranted.

The judgment of the trial court is, therefore, affirmed.

Affirmed.

APPENDIX II

VIRGINIA:

IN THE

CORPORATION COURT OF THE CITY OF NORFOLK,

PART TWO

IN RE: JAY R. TIMMONS, PETITIONER

v.

W. K. CUNNINGHAM, JR., RESPONDENT

MEMORANDUM BY THE COURT

In the petition for the issuance of a writ of habeas corpus, the petitioner alleges numerous grounds upon which he relies, but, as stated in the very thorough Memorandum filed by counsel for petitioner, and during the trial hereof on June 28, 1963, the questions for determination by this court consist substantially of the following two issues of law.

I

At what stage of a state criminal proceeding must counsel be appointed to represent the accused in order to satisfy the demands of the "due process" clause of the United States Constitution, Amendment XIV, and the Virginia Constitution, Section 8?

The crime of murder, with which the petitioner is charged, was committed on October 19, 1961, in the city of Norfolk; and petitioner was arrested on that date by Norfolk City police upon a warrant charging said crime.

On October 20, 1961, petitioner was committed by the court for observation to the Norfolk General Hospital; and on October 25, 1961, petitioner was committed by the court

to the Southwestern State Hospital, at Marion, Virginia, for care, observation and report, pursuant to Title 19.1-227 and 19.1-228 of the Code of Virginia.

On December 20, 1961, the Superintendent of Southwestern State Hospital reported to the court that petitioner was not insane, and was considered to be mentally competent and able to testify in his own defense; and on December 22, 1961, an order was entered by the court directing his return to the city of Norfolk.

Counsel for petitioner refers to Title 37-61.1 and 37-62.1 of the Code of Virginia as requiring the appointment of counsel to represent petitioner before commitment for observation; but an examination of these sections shows that they are not applicable to proceedings in which one is charged with the commission of a crime, which proceedings are controlled by Title 19.1-227 and 19.1-228.

Under these sections, pursuant to which the petitioner was committed, the appointment of an attorney is not required, nor is it necessary under the State law.

The commitment order of October 25, 1961, recites that it was entered "for good cause shown;" and such action was not prejudicial to the rights of petitioner, but were for the protection thereof.

The contention is also made by petitioner that during his confinement in Soutwestern State Hospital he was examined by doctors on the staff of said hospital, during which time he was not represented by counsel, and that the results of such examinations were improperly admitted at his trial.

There is no requirement under State law or procedure for the appointment of counsel under these circumstances, and, in the opinion of this court, none was necessary.

On January 16, 1962, after the return of petitioner to the city of Norfolk, petitioner waived preliminary examination before the Police Justice of the City of Norfolk, and the

charges against petitioner were sent on to the Corporation Court of the City of Norfolk, Part Two, where the indictment upon which petitioner was convicted was returned by the Grand Jury of said court on February 5, 1962.

On February 1, 1962, William H. Sands, a competent attorney of many years' experience at the bar of the city of Norfolk, was appointed by the court to represent the petitioner.

Prior to this time petitioner had not been represented by counsel.

On February 6, 1962, on motion of said attorney, the trial of this case was continued to the March term; and after another continuance was tried before the court and a jury on April 17 and 18, 1962.

On April 18 the jury returned a verdict of guilty of murder in the first degree, and fixed the punishment of petitioner at death.

A motion to set aside the verdict upon certain grounds and grant petitioner a new trial was made on that date and continued; and on May 10, 1962, William H. Sands was permitted to withdraw as counsel for petitioner, and William King Mapp, attorney at law, who had been privately retained as counsel for petitioner, appeared of record as such.

On June 2, 1962, an Amended Motion to set aside the said verdict and award petitioner a new trial was filed by said latter attorney, which motion was argued and overruled on June 11, 1962.

Subsequent proceedings in which petitioner was represented by said attorney resulted in the granting of a writ of error by the Supreme Court of Appeals of Virginia, which on March 4, 1963, affirmed the judgment of the lower court. *Timmons* v. *Commonwealth,* 204 Va. 205.

A petition to grant a rehearing was denied by said court on April 19, 1963.

In the present habeas corpus proceedings, petitioner is not represented by the same attorney, but is now represented by his present counsel.

We now come, therefore, to the question of whether or not the failure to appoint counsel for petitioner until February 1, 1962, was a violation of due process of law insofar as the rights of petitioner are concerned.

Title 19.1-241 of the Code of Virginia provides that in any case in which a person is charged with a felony and is not represented by counsel, the court, before accepting the plea of such person, shall by order entered of record appoint an attorney at law to represent him.

This section, when read in conjunction with Title 14-181, applies only to courts of record; and there is no requirement or provision under the statutes of Virginia for the appointment of counsel under the circumstances of the case at bar, except as stated above.

In the consideration of this question, the court will refer first to the two following recent cases.

In the case of *Hamilton* v. *State of Alabama,* (U.S.), 82 S. Ct. 157 (1961), the court held that under the law of Alabama arraignment is a critical stage in a criminal proceeding, since the defense of insanity must be pleaded at that time or the opportunity is lost. Thereafter, that plea may not be made except in the discretion of the trial judge, and his refusal to accept it is not reviewable on appeal.

Pleas in abatement and certain motions to quash must also be made at the time of arraignment.

The court held, therefore, that failure to appoint counsel for the accused at this stage in the proceedings was a violation of due process of law.

This case is not applicable to the case at bar, since, under the law of Virginia, none of these defenses can be made at the preliminary hearing, but must be made later in a court of record.

In the case of *White* v. *State of Maryland,* (U.S.), 83 S. Ct. 1050 (1963), the accused, without representation of counsel, pleaded guilty when arraigned at the preliminary hearing, and at the subsequent trial the plea of guilty made at the preliminary hearing was introduced in evidence, although he had entered pleas of "not guilty" and "not guilty by reason of insanity" prior to the trial, and relied upon these at the trial.

The court held that the failure to appoint counsel for the accused at the preliminary hearing, under these circumstances, was a violation of due process of law.

This case is not applicable to the case at bar, since the petitioner waived preliminary hearing, no plea was entered, and none could have been properly accepted at the preliminary hearing.

In the case of *Gideon* v. *Wainwright,* (U.S.) 83 S. Ct. 792 (1963), the accused, who was not charged with a capital offense, was denied the right to have counsel appointed by the State courts of Florida, since, under the law of that state, the State courts could only appoint counsel to represent a defendant charged with a capital offense.

The court overruled the previous holding in *Betts* v. *Brady,* 316 U.S. 455, and held that the accused was entitled to have counsel appointed to represent him under the circumstances of this case; and the failure of the State courts to do so constituted a violation of due process of law.

Since the question as to at what stage of the proceedings such appointment should be made was not before the court, this was not considered; and this case is not applicable to the case at bar.

After a consideration of these cases, and the other cases cited by counsel for petitioner, the court is of the opinion that the appointment of William H. Sands as counsel for petitioner by the Corporation Court of the City of Norfolk, Part Two, on February 1, 1962, was in accordance with the law of the State of Virginia, and did not constitute a violation of due process of law.

The court is also of the opinion that the evidence of petitioner fails to sustain the burden of proof necessary to establish his charges that he was mistreated and threatened by the police, denied the right of counsel, and that the statement made by him to the police was secured involuntarily by duress, and while he was under the influence of barbiturates, suffering from alcoholism, and in a mentally deficient, if not insane, state of mind at the time said statement was obtained.

The court is also of the opinion that the evidence of petitioner fails to sustain the burden of proof necessary to establish his charges that he was mistreated and threatened, and denied the right of counsel at Southwestern State Hospital.

II

Was the representation by court appointed counsel afforded the accused effective and adequate, thereby satisfying the demands of the "due process" clause of the United States Constitution, Admendment XIV, and Virginia Constitution, Section 8?

The contention by counsel for petitioner that petitioner was not afforded effective and adequate representation by William H. Sands, his court appointed attorney, as appears from the Memorandum filed herein by counsel for petitioner, is based upon the ground that said attorney failed to make reasonably diligent and thorough inquiry as to the availability of, and to produce at the trial of petitioner,

certain medical and lay testimony concerning the alleged mental condition of petitioner for some time prior to the commission of this offense; and which evidence, according to petitioner, would have been available if such inquiry had been made.

While petitioner testified that his court appointed attorney only saw him three or four times after his appointment and prior to the trial, his attorney testified that he interviewed the petitioner at least ten or fifteen times, "probably more"; and in the opinion of the court such testimony of the attorney appears the more credible and is accepted by the court.

After the defense of insanity was decided upon, and after consultation with the mother of petitioner, as well as petitioner, arrangements were made by the mother for Dr. Robert H. Thrasher, a psychiatrist of extensive training and experience, and who has practiced his profession in this community for a number of years, to examine petitioner and prepare to testify at the trial.

Dr. Thrasher accordingly observed petitioner in February, March and April, 1962, and testified that this was sufficient for him to form an opinion, and testify, as to petitioner's mental condition as of October 19, 1961.

Dr. Thrasher thereupon testified fully at the trial of petitioner, relating details of petitioner's background, including his records as forwarded to Dr. Thrasher by Eastern Shore Hospital, Cambridge, Maryland.

As appears from the record of the trial, several other witnesses, including petitioner's mother and sister, were also called as witnesses on behalf of petitioner, by his attorney, in support of his defense of insanity at the time of the commission of the offense.

After the verdict in question was returned by the jury, the court appointed counsel for petitioner moved that said ver-

dict he set aside, and a new trial awarded petitioner; but before this motion was argued, petitioner's court appointed attorney was replaced by privately employed counsel, as hereinbefore stated, who filed an Amended Motion to set aside said verdict upon the grounds therein set out, and subsequently argued this motion, which was overruled.

It should be noted that no claim was made at this time in the Amended Motion to set aside said verdict that the medical and lay evidence which petitioner claims his court appointed attorney should have discovered and produced at the trial had been discovered since the trial, and that it constituted an additional ground for a new trial as after-discovered evidence.

If available at the time of the trial, it was equally available at the time the motion for a new trial was argued, and if called to the attention of the trial judge, could have been considered by him; and in the event of an adverse ruling, his action could have been reviewed by the Supreme Court of Appeals of Virginia on the Writ of Error which it granted.

It should also be noted from order of March 6, 1962, that petitioner's court appointed attorney moved the court to enter orders requiring production for inspection by counsel for petitioner of a statement made to the police by petitioner; and also that the Superintendent of Southwestern State Hospital be required to furnish to Dr. Thrasher the records of said hospital pertaining to the observation of petitioner during his confinement in that hospital.

These motions were denied, and counsel for petitioner duly excepted thereto, but such action of the trial court was not assigned as error before the Supreme Court of Appeals of Virginia.

The theory of the defense, as stated, was based upon the alleged insanity of the petitioner at the time of the offense,

and counsel for petitioner concluded, as a part of the plan of defense, that the depravity and atrociousness of petitioner's acts at the time of the offense would furnish evidence which would substantiate this claim in the eyes of the jury. Evidence introduced by the Commonwealth, therefore, as to the aggravated nature of petitioner's conduct, was in accordance with the above theory of counsel for petitioner.

Counsel for petitioner urges strongly that the case of *Brubaker* v. *Dickson,* 310 F. 2d 30 (9th Cir., 1962) 37, 39, is similar to the case at bar, and that the decision in that case should be followed in the case at bar.

In this case the court held that under the facts of the case accused had not received reasonably effective assistance and representation in the preparation and trial of the case by his appointed attorney, and ordered a new trial.

At page 37 of the opinion the court states that appellant was entitled to effective aid in the preparation and trial of the case.

The court, at the same page, also says the following:

> "This does not mean that trial counsel's every mistake in judgment, error in trial strategy or misconception of law would deprive an accused of a constitutional right. Due process does not require 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render, and rendering reasonably effective assistance.' Determining whether the demands of due process were met in such a case as this requires a decision as to whether 'upon the whole course of the proceedings,' and in all of the attending circumstances, there was a denial of fundamental fairness. It is inevitably a question of judgment and degree."

At page 35 it appears that the petitioner's trial counsel, a Deputy Public Defender, was appointed shortly after ar-

raignment, and that he initially recommended to petitioner that he plead guilty. In the three and a half months between arraignment and trial, trial counsel saw him on only three occasions, for a total of about an hour. Two of the conferences were devoted largely to matters other than petitioner's defense.

And at page 38 the court further concluded that from the allegations of the petition the defenses available but not presented by trial counsel appear to have been substantial.

This case is clearly distinguishable on its facts from the case at bar; and after a consideration of this case, and the other cases cited by counsel for petitioner, including the case of *Turner* v. *State of Maryland,* 303 F. 2d 507 (4th Cir., 1962), the court is of the opinion that upon the whole course of the proceedings and in all of the attending circumstances, petitioner's court appointed counsel, who was an able and competent attorney, afforded petitioner effective and adequate representation in compliance with due process of law, and that the allegations of the petition are not sustained.

It is the conclusion of the court, therefore, that the prayer of the petition be denied and said petition dismissed.

An order may be presented for entry in accordance with the foregoing.

/s/ J. SYDNEY SMITH, JR., *Judge*

July 23, 1963

APPENDIX III

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

Misc. No. 4518

JAY R. TIMMONS,

Petitioner,

v.

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Respondent.

MEMORANDUM

On October 19, 1961, at approximately 5:15 P.M., the multiple crimes of murder, rape and felonious shooting were committed by the petitioner, Jay R. Timmons. On April 18, 1962, he was tried and convicted of first degree murder by a jury in the Corporation Court of the City of Norfolk, Part II, and his punishment was fixed at death. On May 10, 1962, his court-appointed counsel was granted leave to withdraw from the case as petitioner's family had made other arrangements for legal representation. On June 11, 1962, petitioner's motion for a new trial was denied and the death sentence was imposed. Subsequent proceedings have delayed the execution of said sentence.

A writ of error was granted by the Supreme Court of Appeals of Virginia. In an exhaustive opinion by Justice Spratley the Supreme Court of Appeals of Virginia unanimously affirmed the judgment. *Timmons* v. *Commonwealth,*

204 Va. 205, 129 S.E. (2d) 697. In the present proceeding the Court has the benefit of the record and transcript in the trial on the merits, as well as the record and transcript in the subsequent state habeas corpus proceeding. With one possible minor exception,[1] the opinion of Justice Spratley covers every factual detail relative to the crimes committed and the trial proceedings on the merits of the case. Rather than review the sordid details of the events of October 19, 1961, this Court adopts and incorporates herein all of the facts as set forth in *Timmons* v. *Commonwealth,* supra, to the same extent as though they were quoted herein.

Following the decision of the Supreme Court of Appeals of Virginia on March 4, 1963, a rehearing was sought and denied on April 19, 1963. Thereafter, on May 27, 1963, petitioner filed his state court application for a writ of habeas corpus. A plenary hearing was granted, evidence was heard, briefs were submitted and, on July 23, 1963, the state court judge (not the same jurist who presided over the original trial) filed an extensive memorandum denying and dismissing the writ. An order to this effect was entered on July 30, 1963. A writ of error was denied by the Supreme Court of Appeals of Virginia on October 17, 1963. Certiorari was denied by the Supreme Court of the United States on January 20, 1964. Having fully exhausted his state court remedies, petitioner filed his petition for writ of habeas corpus in this Court on the same day, i.e., January 20, 1964. A stay of execution was entered upon the filing of the federal petition.

The present proceeding was heard by this Court pursuant to written stipulation of counsel and the petitioner on the

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[1] The opinion in *Timmons* v. *Commonwealth,* supra, mentions that petitioner was first committed to a Maryland state mental institution on *June* 20, 1959. The habeas corpus record indicates that this commitment was on *July* 20, 1959. The error, if any, was favorable to petitioner.

basis of the entire record of both state court proceedings. The written stipulation, in effect, was the full equivalent of a plenary hearing.

Three issues are before the Court for determination. They may be summarized as follows:

> (1) At what stage of a criminal investigation or proceeding must counsel be appointed to represent the accused in order to satisfy the "due process" clause of the Fourteenth Amendment?
>
> (2) Must the defendant be present in person and/or represented by counsel when a commitment order is entered by a state court directing the transfer of the accused to a state mental institution for the purpose of determining his sanity at the time of the alleged commission of the offense and for the further purpose of ascertaining his competency to stand trial?
>
> (3) Was the petitioner effectively represented by court-appointed counsel?

The issues will be discussed in the order stated above.

I

When petitioner was taken into custody it must be remembered that he had already made serious incriminating statements. Indeed, petitioner does not, even at this late date, deny the act of killing for which he was tried and convicted on his plea of "not guilty by reason of insanity." The evidence establishes that, on the day in question, petitioner first shot a young lady in the legs; he then shot the now deceased victim at least twice and, at some point in the series of his firing the pistol, he again shot the young lady (who miraculously survived the ordeal) in the neck; the testimony substantiates the contention that petitioner ripped the clothes of the murder victim, but whether he actually

raped her at this or any other time is not clearly proven; returning to the survivor, he pulled her to the floor, tore her dress and undergarments, and raped her; thereafter he went back to the murder victim "for a minute or two"; completing his series of criminal acts, he returned to the survivor and raped her a second time. After entering the kitchen where he apparently consumed a quantity of pills in an effort to take his own life, he went to the telephone and called the police. According to the survivor, he told whoever answered the telephone that he had "killed two women." Returning to the survivor, he ascertained that she was alive and said, "I had better get you to the hospital." He thereupon picked up the survivor in his arms and transported her to the emergency room at DePaul Hospital. Upon arrival at the hospital he told a nurse who met him, "I shot her accidentally. I shot two of them." He thereupon returned to the residence of the murder victim which, by that time, was occupied by the police in response to his telephone call, and he was taken into custody. On the trip to police headquarters he told an officer, "The gun went off, it was an accident, the gun went off four times." Later that evening petitioner said, "I am trying to do a favor for someone, and I am not saying any more."

It was in this setting that the investigation was formally commenced. While petitioner claims that he gave the incriminating statement on October 19—the day of the offense—it is obvious that he is in error. He fixes the time of the statement at 4:00 P.M. or 4:30 P.M.—a time prior to the happening of the tragic events which gave rise to this proceeding. The state habeas court discredits petitioner's allegations that he was mistreated and threatened by the police, and that the statement was secured involuntarily by duress during the time petitioner was under the influence of barbiturates, suffering from alcoholism, and in a mentally

deficient, if not insane, state of mind. The facts are that, on the evening of October 19, petitioner became drowsy and when the police ascertained that he had taken a quantity of pills, petitioner was rushed to the hospital for a "stomach pumping" procedure. The contents of his stomach were analyzed, the results being negative for barbiturates and positive for Methapyrilene—the latter being a sleep-producing drug.

Petitioner was returned to the detective bureau at approximately 4:00 P.M. on October 20. The record, both on the trial and the state habeas hearing, is silent as to whether either of the two detectives said anything to petitioner as to any right to counsel, or otherwise warned him that anything said by him could be used against him. We presume that nothing was said along these lines. At the state habeas corpus hearing petitioner was not questioned as to whether he was given any warning of self-incrimination. Petitioner's counsel now argues that, in line with the principles pronounced in *Escobedo* v. *Illinois*, 378 U.S. 478, decided after the trial and state habeas proceeding, petitioner was in the "accusatory" stage and, therefore, was entitled to the absolute right of counsel. Conceding as we must that petitioner was in the "accusatory" stage on the afternoon of October 20 when he furnished the signed statement to the police, we do not agree that *Escobedo* fits this case. While petitioner testified that he requested the assistance of counsel at varying times prior to the day before his preliminary hearing on January 16, 1962, following his return to Norfolk from the Virginia mental institution for the criminal insane, this contention is refuted by the various police officers with whom he came in contact. The state habeas judge again discredited petitioner's testimony on this point. Absent extraordinary circumstances, the federal court reviewing a state habeas corpus plenary hearing must give

great weight to the findings of the state court. *Hall* v. *Warden,* 4 Cir., 313 F. (2d) 483; *Pannell* v. *Cunningham,* 302 F. (2d) 633; *Brown* v. *Allen,* 344 U.S. 443, 458. Based upon the record before the Court, an independent finding is now made that no request or suggestion as to counsel was advanced by petitioner until the day before his preliminary hearing on January 16, 1962.

Petitioner has testified that he requested the assistance of counsel after being transferred to Southwestern State Hospital at Marion, Virginia, pursuant to a state court order entered on October 25, 1961. He identified a Dr. Centor as being the individual who threatened him and to whom he directed his request for an attorney. Dr. Centor was the chief psychologist at the hospital. As the petition for writ of habeas corpus did not allege that petitioner requested counsel[2] while at the state mental institution, Dr. Centor was not available at the state habeas proceeding. During the course of the state habeas hearing a telephone call was made to Dr. Centor. A stipulation as to what Dr. Centor would testify to, if present, was entered into the record. Inadvertently or otherwise, the stipulation makes no reference as to what Dr. Centor would testify with respect to petitioner's contention that he expressed a desire for counsel. When the federal petition was filed, counsel for respondent filed an affidavit from Dr. Centor but, on motion of petitioner, this Court sustained the motion to strike said affidavit reserving to respondent the further right to take the testimony of said witness. No subsequent effort was made to take Dr. Centor's deposition or otherwise produce him at the hearing. On the bare record we have only the

[2] The petition does allege that the examinations, tests and interrogatories were conducted at the Southwestern State Hospital "without your petitioner having counsel appointed to represent him or without the benefit of counsel."

evidence of petitioner that he did request counsel while at the hospital. The state habeas judge held that petitioner had failed to sustain the burden of proof necessary to establish that he was denied the right of counsel while at the hospital. Apparently the state court refused to believe petitioner's testimony on this point despite the fact that it stands uncontradicted on this record.

While we believe that the state court was justified in branding petitioner's statement as unworthy of belief, we conclude that it is better to dispose of this contention by holding that, assuming arguendo the request for assistance of counsel at the state mental institution, the constitutional rights of petitioner were not invaded even if such a request was made and denied. State mental institutions to which persons accused of crime are frequently sent for the purpose of determining mental competency, both at the time of trial and as of the date of the alleged offense, cannot be thwarted in their efforts to accomplish the purpose of intelligent examinations by the presence of attorneys. Assuming the validity of the commitment order, petitioner would have this Court hold that, at any time during the 61 days petitioner was held for observation, there existed a constitutional right to demand the advice and assistance of counsel. We do not believe that any court could give serious consideration to such an argument and, indeed, no authority has been cited which even remotely touches upon the point. Moreover, and of even greater significance, it should be again noted that the petitioner entered a plea of "not guilty by reason of insanity." It is true that the tests, examinations and interrogations conducted at the mental institution were introduced in evidence *but not until after the petitioner had presented affirmative evidence of insanity by a qualified private psychiatrist who related in detail the tests, examina-*

tions and interrogations conducted by him. The end result of petitioner's contention, if accepted by the court, would mean that a suspected mentally-ill person accused of crime could successfully prevent any study or interogation by the prosecution, thereby limiting the testimony on insanity to the opinion of a privately-employed psychiatrist and thus destroying the adversary system. As stated by former Chief Judge Sobeloff in *Thomas* v. *Cunningham,* 4 Cir., 313 F. (2d) 934, commenting upon the Virginia statute authorizing the commitment of suspected mentally-ill persons accused of crime:

> "In clear recognition of its constitutional obligation, Virginia expressly authorizes a hearing on the question whether 'the person to be tried is in such a mental condition that his confinement in a hospital for the insane, or colony for the feeble-minded, for proper care and observation is necessary to attain the ends of justice.' Since a defendant cannot always be expected to demand an examination for himself, the judge may invoke the procedure *sua sponte.*"

Accordingly we hold that there is no constitutional right on the part of an accused, committed pursuant to court order as being suspected of insanity, to demand the advice or assistance of counsel while at the mental institution under the circumstances and for the purposes here presented.

On January 15, 1962—the day prior to the scheduled preliminary examination in the Municipal Court of the City of Norfolk—petitioner was visited in the Norfolk City Jail by Detective Artman. The purpose of this visit was to ascertain whether petitioner desired to waive his preliminary hearing on the following morning. Petitioner inquired as to *when* he would get a lawyer. Artman replied by stating that an attorney would be appointed for him "if he did not

have one of his own at the time that he would be indicted." At this conversation no incriminatory statements were made by petitioner. The following morning petitioner was taken to the Municipal Court and executed the waiver of his preliminary hearing. It is well settled that an accused may waive a preliminary hearing as it is procedural and not jurisdictional. Moreover, Virginia has held that an objection to a procedural defect such as stated above must be made timely. *Snyder* v. *Commonwealth,* 202 Va. 1009, 121 S.E. (2d) 452.

Assuming, without deciding, that petitioner actually requested the assistance of counsel at the preliminary hearing, we do not think that it necessarily follows that counsel must be then appointed.[3] The latest and most authoritative voice on this subject comes from the Supreme Court of the United States in *Pointer* v. *State of Texas,* ..... U.S. ....., 33 L.W. 4306, decided April 5, 1965. It is there said:

> "In this court we do not find it necessary to decide one aspect of the question petitioner raises, that is, whether failure to appoint counsel to represent him at the preliminary hearing unconstitutionally denied him the assistance of counsel within the meaning of *Gideon* v. *Wainwright, supra.* In making that argument petitioner relies mainly on *White* v. *Maryland,* 373 U.S. 59, in which this court reversed a conviction based in part upon evidence that the defendant had pleaded guilty to the crime at a preliminary hearing where he was without counsel. Since the preliminary hearing there, as in *Hamilton* v. *Alabama,* 368 U.S. 52, was one in which pleas to the charge could be made, we held in *White* as in *Hamilton* that a preliminary pro-

[3] In 1964, several years following petitioner's trial, Virginia adopted § 19.1-241.1 granting an accused felon the right of representation by legal counsel at every stage of any proceeding against him. Petitioner argues that this statute is merely a restatement of constitutional rights pre-existing the enactment of § 19.1-241.1. We disagree.

> ceeding of that nature was so critical a stage in the prosecution that a defendant at that point was entitled to counsel. But the State informs us that at a Texas preliminary hearing, such as is involved here, pleas of guilty or not guilty are not accepted and that the judge decides only whether the accused should be bound over to the grand jury and if so whether he should be admitted to bail. Because of these significant differences in the procedures of the respective States, we cannot say that the *White* case is necessarily controlling as to the right to counsel. Whether there might be other circumstances making this Texas preliminary hearing so critical to the defendant as to call for appointment of counsel at that stage we need not now decide on this record, and that question we reserve."

There is no contention that petitioner made any incriminatory statement at the preliminary hearing or at any subsequent time prior to the appointment of counsel[4] which took place immediately upon petitioner's indictment at the February, 1962, term of the grand jury. More important, however, is the fact that Virginia, as in Texas, does not permit the acceptance of either a plea of guilty or not guilty on a felony charge at a preliminary hearing. Even the procedure prescribed for waiving an indictment does not permit a plea to be entered at a preliminary hearing on a felony charge. § 19.1-162. In *Webb* v. *Commonwealth*, 204 Va. 24, 129 S.E. (2d) 22, it was held that the require-

[4] The trial record indicates that court-appointed counsel for petitioner filed a motion on February 27, 1962, seeking an order requiring the Commonwealth to furnish a copy of a written statement made by petitioner to the police on January 31, 1962. The motion was denied. The statement of January 31, 1962, if any ever existed, was not presented in evidence. The court-appointed attorney testified in the state habeas proceeding that he had no knowledge of the statement of October 20, 1961, until it was offered in evidence. The petitioner testified at the state habeas proceeding that he had given two statements, one of which was introduced in evidence.

ment of a preliminary hearing (assuming no waiver) of one arrested on a charge of a felony is not jurisdictional, and that its denial does not violate the "due process" and "equal protection" of the law clauses of § 1 of the Fourteenth Amendment to the Constitution of the United States and § 8 of the Constitution of Virginia. Since Virginia's highest court has spoken on the subject, and in the absence of a positive ruling to the contrary in *Pointer* v. *State of Texas, supra*, we hold that petitioner's argument to the effect that he was entitled to the assistance of counsel (assuming that he had requested same) at the preliminary hearing is devoid of merit.

The discussion as to the right to counsel could probably be terminated at this point. Nevertheless, because the petitioner is under a death sentence, we deem it appropriate to state the views of this Court as to the limiting effect of *Escobedo* v. *Illinois,* supra, and especially in the light of the factual situation herein presented. In *Escobedo* the defendant, after arrest, made several requests to see his retained counsel who, though present in the building to the knowledge of the police, was refused access to his client. Defendant was not advised of his right to remain silent and, after persistent questioning by the police, made an incriminatory statement to an Assistant State's Attorney which was admitted in evidence at the trial. Defendant was convicted of murder and, on direct appeal, the Supreme Court of the United States reversed and remanded in a five to four decision. It is the broad language in *Escobedo* which has given rise to much confusion among attorneys and judges. For example, it is said (378 U.S. 490):

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but [1] has begun to focus on a particular suspect, [2] the suspect has been taken into police custody, [3]

> the police carry out a process of interrogations that lends itself to eliciting incriminating statements, [4] the suspect has requested and been denied an opportunity to consult with his lawyer, and [5] the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the assistance of counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon* v. *Wainwright*, 372 U.S., at 342, 83 S. Ct. at 795, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

With three exceptions, petitioner apparently comes within the foregoing holding. The exceptions are (1) petitioner did not request a lawyer at the time of or prior to giving his incriminatory statement, (2) petitioner's counsel did not object to the introduction of the incriminatory statement (a point which will be hereafter considered), and (3) petitioner entered a plea of "not guilty by reason of insanity." A fourth possible exception is that the record is silent as to whether petitioner had been warned of his right to remain silent but, for the purpose of this discussion, we are assuming that he was not warned.

Reverting to *Escobedo* we find the following language in an attempt to clarify the syllogism previously expressed (378 U.S. 492):

> "Nothing we have said today affects the powers of the police to investigate 'an unsolved crime,' *Spano* v. *New York*, 360 U.S. 315, 327 (Stewart, J., concurring), by gathering information from witnesses and by other 'proper investigative efforts.' *Haynes* v. *Washington*, 373 U.S. 503, 519. We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession —our adversary system begins to operate, and, under

the circumstances here, the accused must be permitted to consult with his lawyer."

Law professors, attorneys and judges now apparently overlook the words "under the circumstances here" and place great emphasis on the words "*must* be permitted to consult with his lawyer." They are, furthermore, inclined to the belief that the Supreme Court will eventually drop the bars with respect to one or more of the five elements previously quoted herein. In *People* v. *Dorado,* 394 P. (2d) 952, 33 L.W. 2415, certiorari pending, the Supreme Court of California recently held that defendant's failure to request or obtain counsel was an exception which did not remove the case from the rule pronounced in *Escobedo.* On the same day, in a rather obvious effort to obtain a more definitive ruling from the Supreme Court of the United States, the California Supreme Court held that *Escobedo* was not intended to be retroactive, *In re Lopez,* ..... P. (2d) ....., 33 L.W. 2390, thereby holding that a collateral attack upon a conviction prior to *Escobedo* was not available to one whose Sixth Amendment rights would have otherwise been expanded under *Escobedo.* New Jersey has likewise rejected the possible retroactivity of *Escobedo* in *State* v. *Johnson,* ..... Atl. (2d) ....., 33 L.W. 2375. On a different approach Nevada and Ohio have concluded that each of the factors specified in *Escobedo* must occur to make the same a controlling precedent. *Bean* v. *State,* ..... P. (2d) ....., 33 L.W. 2390; *State* v. *McLeod,* ..... N.E. (2d) ....., 33 L.W. 2351.

The Fourth Circuit has recently distinguished *Escobedo* in *Davis* v. *State of North Carolina,* ..... F. (2d) ....., decided December 8, 1964, where, in a three to two opinion, it was said:

> "This case is, therefore, far from the principle of *Escobedo* v. *Illinois,* 378 U.S. 478. In *Escobedo,* a suspect, not otherwise lawfully subject to detention, was being interrogated. During the course of his questioning he repeatedly asked permission to consult his lawyer, and his lawyer was present in police headquarters, insistently demanding access to his client. One time, through opening doors, the lawyer and client actually got a glimpse of each other, but their persistent demands and requests to consult were as persistently refused until after a confession had been obtained. The Supreme Court held, of course, that the suspect should have been allowed to speak to his lawyer who was present for that purpose and who was actively asking, himself, to speak to his client. Denial of the right to consult his attorney was held, under those circumstances, to have been a denial of due process.
>
> "Here, we have no such circumstances. Davis, advised that he could consult an attorney if he wished, sought only to have his sister come to see him. The police did all that they could to assist him in the realization of that wish. When there was no request of legal assistance and when the police did all that reasonably might be expected of them to facilitate the prisoner's seeing the one person he wished to see, it cannot be held that the police unreasonably deprived him of his right to counsel."

The sharp dissenting opinion of former Chief Judge Sobeloff manifestly indicates that the majority interpreted *Escobedo* as being limited to the facts of that case. Relying upon the California case of *People* v. *Dorado,* supra, Judge Sobeloff at least intimates that the request for counsel at a time when the party interrogated may be characterized as in the "accusatory" stage is unnecessary. On the retroactive application of *Escobedo,* Judge Sobeloff expresses the view that since other federal and state courts have held *Gideon* v.

Wainwright, 372 U.S. 335, to be retroactive, *Escobedo* should be accorded the same treatment.[5] While we have no Virginia or Fourth Circuit decision on the retroactive effect of *Escobedo* (other than as noted in Judge Sobeloff's dissenting opinion in *Davis*), we recognize that the Fourth Circuit has held *Mapp* v. *Ohio,* 367 U.S. 641, to be entitled to retroactive application. *Hall* v. *Warden,* 4 Cir., 313 F. (2d) 483. Under no circumstances could the present case be decided upon the theory that *Escobedo* is not entitled to retroactive treatment in light of the foregoing considerations.

In a direct appeal on a conviction for rape, Virginia has adopted a middle ground as to the necessity of counsel during an interrogation where the defendant was in the "accusatory" stage. *Cooper* v. *Commonwealth,* ..... Va. ....., 140 S.E. (2d) 688. Defendant was represented by counsel at the preliminary hearing which resulted in a dismissal of the charges. Thereafter, without notice to counsel but after warning defendant of his rights, an investigator for the Virginia State Police interrogated the accused on two separate occasions, one of which followed the grand jury indictment while defendant was in jail. A tape recording of the conversation between the four year old child and her mother was made and, at the last interview with defendant, was played to him. Defendant never admitted the crime but at one point in the interview "he started halfway to cry there and he said I don't know why." No other incriminatory words were spoken. In concluding that defendant was entitled to counsel at the time of the second interrogation, the court said:

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[5] It is interesting to note that the Third Circuit, in a case arising out of New Jersey, has held *Gideon* to be retroactive, *Palumbo v. State of New Jersey,* 334 F.(2d) 524, but the New Jersey court has now ruled that *Escobedo* is not retroactively applied, *State v. Johnson,* ....Atl. (2d) ....., 33 L.W. 2375.

"It is true that Cooper was advised of his rights before he was examined and that no threats or inducements were made to him. It is also true that the record does not show that Cooper asked to consult with counsel, but the fact remains that he was not experienced in criminal procedure, his intellectual endowment was 'at the lower limits of normal' and his ability to function under stress was 'in a corresponding range.' He had been indicted for a capital offense and was subjected to a lengthy examination by a skillful police investigator who was seeking to obtain an admission or confession. The interrogation was no longer investigatory; it was accusatory. It cannot be successfully denied that the defendant needed the assistance of counsel during this stage of the proceeding.

"We do not mean to say that in all cases counsel must be present when a confession, admission or incriminating statement is made by an accused in order that this evidence be admissible against him in a criminal prosecution. Each case must be judged on its own particular facts.

"We only hold that under the facts and circumstances of this case the defendant was deprived of his constitutional right to the assistance of counsel, and that the trial court, therefore, committed prejudicial error in admitting in evidence the testimony of Mundy concerning the contents of the tape recording and in admitting in evidence the tape recording itself, all of which had a direct bearing on the meaning of his alleged admission 'I do not know why'."

Thus, Virginia, without mentioning *Escobedo,* has held that, under certain circumstances, counsel must be present at an interrogation stage of an investigation which has focused upon a particular accused. Of course, in *Cooper,* there was an objection to the contents of the tape recorder and the playing of same.

Again assuming that petitioner was not warned of the right to remain silent, courts are divided as to the effect of *Escobedo*. In *People* v. *Hartgraves*, 31 Ill. (2d) 375, 202 N.E. (2d) 33, the defendant was not affirmatively warned that his confession might be used against him, and the Illinois court, examining its prior holdings in light of *Haynes* v. *Washington*, 373 U.S. 503, and *Escobedo*, pointed out that *Haynes* merely stated that the failure to warn a defendant and advise him of his right to remain silent is an attendant circumstance which the accused is entitled to have appropriately considered in determining voluntariness and admissibility of his confession. As to *Escobedo*, Illinois concluded that the refusal of a request for assistance of counsel, coupled with a failure to warn the accused of his right to remain silent, amounted to a denial of the assistance of counsel, but since the accused did not request the assistance of counsel the confession need not be rejected. In *State* v. *Neely*, Ore., 395 P. (2d) 557—a decision which the Illinois court considered and rejected—the only contention raised was that the defendant had not been warned of his right to remain silent. The record was silent as to whether the defendant had been so advised, but the court concluded that the defendant's testimony created an *inference* that he was not warned—a situation that is substantially identical with the present case. Oregon held that, under its prior decisions, the confession would not be violative of defendant's rights but, since *Escobedo*, and considering the dissenting opinion of Mr. Justice White in which he agrees with the majority as to the duty to "warn," Oregon concluded that the necessity of a warning against self-incrimination is now required. While somewhat in a different light as it involved the question of self-incrimination at the trial level, we know that the Supreme Court has now held that no state court may require a defendant to testify as to a matter which may

tend to incriminate himself. *Malloy* v. *Hogan,* (1963) 378 U.S. 1, reversing its prior rulings in *Twining* v. *New Jersey,* 211 U.S. 78, and *Adamson* v. *California,* 332 U.S. 46.

Obviously *Escobedo* will require a further study by the United States Supreme Court. Under the facts as found in *Escobedo* it is difficult to disagree with the majority on the conclusion reached. The nation and its law enforcement agencies can properly "live" with this decision. In petitioner's case we note that he does *not* complain or allege, either in the state or federal petitions for habeas corpus, that he was not warned of his right to remain silent. His attack is directed to the refusal of counsel, threats, mistreatment and the failure of his court-appointed counsel to object to the confession taken on October 20, 1961. Such being the case, the issue of any failure to give any warning as to the use of an incriminating statement is not before the Court. Realizing, however, that it may resolve itself into a "merry-go-round" procedure, the statements and conclusions herein reached may forestall such action.

The logical effect of *Escobedo,* if given the interpretation placed upon it by several courts which have suggested that once the inquiry has begun to focus upon a particular suspect it is then incumbent upon the authorities interrogating the suspect to see to it that the suspect is given an attorney (whether requested or not), is that we have adopted throughout our nation a mandatory system of judicial supervision of investigative processes. The judiciary has always *reviewed* such procedures but never before has it been called upon to supervise same. Let us assume that the interrogating process commences as a general inquiry and, during the course of such interview, the party being interrogated makes certain statements which then lead the interrogating officer to believe that he is the actual suspect. According to many legal authorities it then becomes necessary to stop the inter-

rogation, arrange for the presence of an attorney, warn the suspect of his right to remain silent and then endeavor to proceed with the interrogation. If this is what is intended by *Escobedo,* we should save ourselves a great deal of time, effort and expense by the simple process of eliminating all confessions, other than those spontaneously made at the very moment of arrest and prior to any interrogation.

For these reasons—and there are many more hypothetical situations which could be stated by way of illustration—it is the conclusion of this Court that *Escobedo* is essentially an *ad hoc* decision, especially in light of the qualifying language "under the circumstances here." There may well be a valid distinction in situations where the accused has had his preliminary hearing or has been indicted and is awaiting trial or the appointment of counsel.

Assuming, however, that the conclusion just reached is erroneous, we must again observe that there was *no objection* to the introduction of the written confession. Under such circumstances how can the petitioner now complain, other than as to the issue of ineffective counsel? Should the trial court, on each occasion that a confession is presented in evidence without objection, thereupon excuse the jury and conduct its own investigation *sua sponte* as to whether the requirements of *Escobedo* have been met? If this is what is necessary, we must again conclude that all confessions should be excluded, even those spontaneously made. We cannot believe that the Supreme Court intended *Escobedo* to be carried to this extreme.

One final point. Evidence adduced at the habeas corpus hearing *but not introduced at the trial on the merits* reveals that petitioner was given a paraffin test on the evening of October 19, 1961, shortly after arriving at police headquarters. While we believe that such a test was probably incidental to a lawful arrest where the firing of a loaded

weapon was involved, we fail to see where such a test, assuming its illegality, plays any part in the determination of petitioner's constitutional rights.

We conclude, therefore, that petitioner's rights in this case were not violated in failing to appoint counsel prior to the return of the indictment but, even if violated in some manner, the only possible prejudice was in the introduction of the confession of October 20, 1961, to which there was no objection interposed.

II

Little need be said as to the necessity of petitioner's presence in court on October 25, 1961, when the state court judge entered an order committing petitioner to the state mental institution for observation as to his sanity. As Judge Sobeloff said in *Thomas* v. *Cunningham,* supra, the judge may invoke the procedure *sua sponte.* We might add that the judge would have been derelict in his duty had he not taken such action. And it is a recognized fact that, in the field of psychiatry, the prospects of making an appropriate evaluation as to the mental condition of the accused are far better when the party to be examined is immediately sent to the mental institution. Petitioner relies upon §§ 37-61.1 and 37-62.1, Code of Virginia, requiring the appointment of counsel prior to civil commitments but, of course, these statutes have no relation to proceedings in which one is accused of a crime which, as the state habeas judge correctly held, are governed by §§ 19.1-227 and 19.1-228. Commitment proceedings as to persons accused of crime are for their protection. The record reflects that notice of the hearing on the entry of the commitment order was given to petitioner who was then a patient under guard at the Norfolk General Hospital, and the commitment order recites that such notice was given. The return of the City Sergeant in-

dicates that the petition for a commitment order was served on October 24, 1961, one day prior to the entry of such order. If the personal presence of the party sought to be committed is required at any such hearing prescribed by § 19.1-228, it will present grave difficulties with respect to many suspected mentally ill persons accused of crime and will, in effect, prejudice the rights of an accused as many such persons are not in condition to appear in court.

III

We turn to the allegation of ineffective counsel—a contention that has a familiar ring in all cases involving convicted persons. This Court has had occasion to sustain this contention on several occasions, in some of which the trial judge has been primarily responsible, but at all times this Court has avoided "second-guessing" the performance of the attorney. In any case, irrespective of the result, a judge or lawyer can look back over the trial and say that other action should have been taken. The "Monday morning quarterback" is invariably in a better position to call the signals.

At the outset we observe that the Supreme Court of Appeals of Virginia had occasion to commend trial counsel in the direct appeal, *Timmons* v. *Commonwealth*, supra, where it is said:

> "The defendant was represented by able and competent counsel both in the trial court and in this Court. In the trial court, it was sought to show that he was insane, and much of the evidence, as we have seen, was brought out in answer to questions propounded by defendant's counsel, and admitted on that issue. He cannot be allowed to take advantage of his claim in the trial court that evidence of his condition at the time of the killing showed that he was insane, and now on appeal be permitted to successfully contend that the

admission of such evidence was erroneous and prejudicial to him."

Whatever may be said as to the retroactive effect of *Escobedo* (1964), *Gideon* (1963), *Haynes* (1963), *Cooper* v. *Commonwealth,* supra (March 8, 1965), and the many other decisions attempting to distinguish or clarify these recent opinions, we know of no case which attempts to determine the effectiveness of trial counsel on any basis other than what the law was at the time of trial which, in the present situation, was April 17-18, 1962.

Argument is made that there was no objection to the introduction of the written confession obtained from petitioner during a forty minute interrogation on the afternoon of October 20, 1961. Let us review the position in which court-appointed counsel was at that moment. In the first place, we must remember that the petitioner, at his insistence evidenced by a writing delivered to his attorney, had entered a plea of "not guilty by reason of insanity." As observed in *State* v. *Long,* 90 N.H. 103, 4 Atl. (2d) 865, such a plea is in the nature of a plea in "confession and avoidance." There had been numerous discussions between petitioner and his counsel as to the plea to be entered, as well as suggestions that a plea of guilty might save petitioner from the electric chair. Unlike the federal courts, the so-called "negotiated plea" is an accepted practice in the state courts, with the prosecuting attorney and defense counsel frequently agreeing upon a joint recommendation to be made to the court in disposition of a criminal case. The final decision on the plea to be entered rested with petitioner.

Moreover, at the time the confession was introduced the lady who was twice raped and was an eye witness to the murder had already testified with respect to the many sor-

did details of what occurred on the afternoon of October 19, 1961. The evidence of guilt at the moment the confession was introduced was overwhelming. While the court-appointed attorney was not cross-examined at the state habeas hearing as to his failure to object to the confession, it is perfectly apparent that the attorney concluded that the confession, if it had any bearing on the fairness of the trial, would perhaps be beneficial to petitioner.

Examining the 74 page opinion in *Culombe v. Connecticut*, 367 U.S. 568, we find nothing therein contained which would serve as a warning to petitioner's court-appointed counsel that *Escobedo* and *Haynes* would necessarily be forthcoming. Assuming arguendo that petitioner's confession of October 20, 1961, would now be legally impermissible, this has no bearing on the effectiveness of petitioner's counsel.

The principal complaint now asserted by petitioner is that his attorney failed in his duty to make reasonable inquiry in petitioner's home area (Berlin, Maryland) with respect to his prior activities tending to support the issue of insanity. He relies upon *Brubaker* v. *Dickson*, 9 Cir., 310 F. (2d) 30, cert. den. 372 U.S. 978, in which the petition was refused a plenary hearing in both the state and federal courts. On this point the case was reversed and a factual hearing was ordered. The test of the attorney's obligation is well stated therein (310 F. (2d) 37):

> "The test to be applied in determining the legal adequacy of the allegations of appellant's petition is readily stated: 'The requirement of the Fourteenth Amendment is for a fair trial'; the due process clause 'prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right.' Compliance with this standard required that appellant, charged with a capital offense, be represented at trial by counsel.

"But the constitutional requirement of representation at trial is one of substance, not of form. It could not be satisfied by a pro forma or token appearance. Appellant was entitled to 'effective aid in the preparation and trial of the case.'

"This does not mean that trial counsel's every mistake in judgment, error in trial strategy, or misconception of law would deprive an accused of a constitutional right. Due process does not require 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance.' Determining whether the demands of due process were met in such a case as this requires a decision as to wether 'upon the whole course of the proceedings,' and in all the attending circumstances, there was a denial of fundamental fairness; it is inevitably a question of judgment and degree."

The effectiveness of court-appointed counsel for petitioner, on the basis of the trial record, has already been determined by the Supreme Court of Appeals of Virginia. Acknowledging that such a conclusion would not be binding as to subsequent evidence adduced at the habeas corpus hearing, we next have a finding contrary to petitioner's contention by the state habeas corpus judge, with a subsequent denial of a writ of error by Virginia's highest court and a refusal of a writ of certiorari by the United States Supreme Court. Totally aside from the foregoing—which should be sufficient in itself—this Court has carefully reviewed the trial record and transcript, along with the state habeas transcript, and now finds that the argument of ineffective counsel is devoid of merit.

Complaint is made that counsel failed to investigate and arrange for the presence of a Dr. Robbins, a general practitioner from the Eastern Shore of Maryland. Petitioner's counsel knew that this physician, during 1959, had arranged

for petitioner's initial commitment to a Maryland state mental institution. He inquired of petitioner and petitioner's mother as to the then whereabouts of Dr. Robbins (referred to in parts of the testimony as Dr. Robertson). He was told that Dr. Robbins had left Maryland and gone to New York. Approximately 13 months following petitioner's conviction Dr. Robbins was located by petitioner's post-conviction privately employed attorneys in Greenwood Lake, New York. The difficulties, if any, in locating Dr. Robbins are not disclosed by the record. The attack upon court-appointed counsel is that he did nothing further in an effort to locate Dr. Robbins. While this is a correct statement of fact, let us examine what the court-appointed attorney did under the circumstances.

He arranged for the entire Maryland state mental hospital record to be forwarded to Dr. Robert H. Thrasher, a local psychiatrist with ample qualifications. He arranged for Dr. Thrasher to testify at the time of trial and a review of Dr. Thrasher's testimony demonstrates his firm opinion that petitioner was insane. There was, of course, evidence to the contrary and the jury did not accept Dr. Thrasher's conclusions. The Maryland psychiatrist who attended petitioner during his stay at the mental institution in 1959 was Dr. Crawford who died shortly prior to petitioner's trial. Court-appointed counsel unsuccessfully endeavored to secure, by court order, a copy of the records of Southwestern State Hospital for the purpose of examination by Dr. Thrasher in advance of trial.

There is little, if anything, that Dr. Robbins could have added to the defense of insanity. Dr. Thrasher knew and testified to the incidents leading to petitioner's commitment to the Maryland state mental institution. There is no contention that Dr. Robbins is peculiarly qualified in the complex field of psychiatry. If the good doctor had been located

and brought to Norfolk for the trial, his opinion would have been seriously impaired by his standing as a general practitioner only. Dr. Robbins had not seen or consulted the petitioner since 1959. Dr. Thrasher, on the other hand, was thoroughly qualified in psychiatry and, in addition to studying the reports of petitioner's prior mental difficulties and ascertaining other facts from independent sources, had the opportunity of conferring with and studying the petitioner on approximately four occasions prior to trial. We hold that the court-appointed attorney was not ineffective or otherwise derelict in his duty in not extending greater efforts to locate Dr. Robbins.

We are next told that court-appointed counsel failed to go to Maryland and interview potential witnesses in petitioner's home community on the issue of insanity. Accepting as a finding well supported by the evidence that the attorney was not told of the existence of potential witnesses in the home community, we note that petitioner's sister, Lois Rogers, and his mother, Mabel Deneau, testified in petitioner's behalf at the original trial. The mother described petioner's behaviour pattern, nervousness, prior mental difficulties, the act of petitioner in shooting himself in the leg, his visit to his home community on October 12, 1961, and what was said by petitioner, his drinking problems, and what Dr. Crawford (the physician who died) had said about petitioner's mental condition.[6] Neither the mother nor sister testified at the state habeas hearing. The attorney testified that he had interviewed the mother on two or three occasions and the only reference to any party in the home community, other than Drs. Robbins and Crawford, was

[6] Petitioner's attorney attempted to bring out Dr. Crawford's statement to the mother on direct examination, but an objection was sustained. On cross-examination the prosecution asked the questions of the mother and answers were given.

to one Patricia Smith—apparently a girl with whom petitioner had been keeping company immediately prior to his act of shooting himself in the leg. And when we examine the deposition testimony of lay witnesses produced at the state habeas hearing, we note that from a factual standpoint they knew little or nothing more than petitioner's mother had already related. Petitioner now argues that each of these lay witnesses expressed an opinion that petitioner was insane and that this conclusion would have had a decided effect upon the jury. We agree with the respondent that such a conclusory statement would not have been admitted at the original trial. *Ramsey* v. *Commonwealth,* 200 Va. 245, 249, 105 S.E. (2d) 155, 158; *Jones* v. *Commonwealth,* 202 Va. 236, 117 S.E. (2d) 67, 71. Petitioner's reliance upon *Forehand* v. *Sawyer,* 147 Va. 105, 136 S.E. 683, is misplaced. That was a will case involving testamentary capacity of the testator, a matter which is governed by other factors. Moreover, we conclude that, under all the facts and circumstances of this case, it is unreasonable to expect that the court-appointed attorney should visit an area approximately 100 miles from the place of trial for the purpose of conducting a house-to-house canvass in an effort to determine the views of lay witnesses as to the sanity of the accused.

Complaint is made that the attorney neglected to object to the introduction of certain evidence during the course of the trial. Without finding that the attorney erred in any respect on this point, at the most such an error would be a matter of trial tactics. It has been repeatedly held that mistakes in judgment or trial tactics by defense counsel do not deprive the accused of a constitutional right and are not reviewable on habeas corpus. *Tompa* v. *Commonwealth,* 4 Cir., 331 F. (2d) 552. The record clearly shows that the purpose of court-appointed counsel was to establish the ac-

tions of petitioner at the home of the murder victim in order to convince the jury that only an insane person, with no apparent motive, could shoot two young girls, killing one and seriously injuring the other, raping the injured girl twice while she was lying in a pool of her own blood, and raping or attempting to rape the murder victim after she was dead or while she was dying. The Supreme Court of Appeals of Virginia commented upon the failure to object and noted the approach to the problem confronting counsel. The weakness of petitioner's argument on the failure to object is adequately demonstrated by the absence of comment thereon in petitioner's brief filed in this court.

CONCLUSION

The records in the original trial and state habeas corpus hearing have been minutely examined as this Court is appreciative of the fact that the death sentences are now the subject of nationwide criticism. Such a matter is, of course, for the legislative branch of our government. This Court expresses no independent view as to the sanity of petitioner. In Virginia, unlike the federal practice, the burden rests upon the accused to prove his mental incompetency. *Wessels* v. *Commonwealth,* 164 Va. 664, 180 S.E. 419; *Holober* v. *Commonwealth,* 191 Va 826, 62 S.E. (2d) 816; *DeJarnette* v. *Commonwealth,* 75 Va. 887. The United States Supreme Court has declined to interfere with a state's policy on the issue of insanity. *Leland* v. *Oregon,* 343 U.S. 790. Virginia throws a further safeguard around the execution of the death sentence under § 19.1-235 Code of Virginia, 1950 as amended. The moral question of executing a person of petitioner's mentality is for the executive branch and the courts are powerless to prescribe the answer. *Davis* v. *State of North Carolina,* supra; *Snider* v. *Cunningham,* 4 Cir., 292 F. (2d) 683, 686.

We conclude that petitioner was given a fair trial, that his constitutional rights as applied to the facts and trial procedures of this case were not violated, and that he was adequately and effectively represented by an experienced attorney.

By reason of the fact that petitioner is under a death sentence, if an appeal is noted the Court will issue a certificate of probable cause.

/s/ .....
United States District Judge

April 28, 1965

APPENDIX IV

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPINION OF THE COURT

J. SPENCER BELL, Circuit Judge:

Jay Timmons was convicted by a jury of first degree murder in April 1962. He was sentenced to die. The Supreme Court of Appeals of Virginia affirmed the judgment of conviction. *Timmons* v. *Commonwealth,* 204 Va. 205, 129 S.E.2d 697 (1963). Habeas corpus was sought in the state courts; a hearing was held, and in July 1963 relief was denied. The Virginia Supreme Court of Appeals denied a writ of error, and the Supreme Court denied certiorari. *Timmons* v. *Cunningham,* 375 U.S. 994 (1964). Habeas corpus was then sought in the court below; the facts were stipulated by counsel, and on April 28, 1965, the district court dismissed the petition but granted a certificate of probable cause. *Timmons* v. *Peyton* (D.C.E.D. Va.), 240 F. Supp. 749.

The facts of this case are the following: On October 19, 1961, at about 5:20 p.m. Jay Timmons shot two women. One of them was killed; the other was shot through both legs and through the neck. Timmons and the women had attended grade school together in a small town in Maryland. Timmons was employed by the father of the deceased victim. He had apparently come to the house in order to persuade her to give him a contract to paint her house. There is no indication in the record of any recent social relationship between Timmons and either of the two women. Apparently, he had not seen either of them other than

on two or three occasions since childhood. When the surviving witness entered the house, the other woman sat at her desk writing. Timmons entered the living room and greeted the newcomer quite casually. This was the only remark made before the shooting began. After shooting them Timmons proceeded to have sexual intercourse with the one who was still alive. It is possible that he also had intercourse with the dead woman. He then telephoned the police and told them he had shot two women. Discovering that one of them was alive, he picked her up in his arms, took her to a car, and drove her to the hospital. He then returned to the residence where the events had taken place; the police were already there. This was about 5:35 p.m.

The police took Timmons to headquarters, En route he said it was an accident; a little later he said he would say no more. Shortly thereafter Timmons was rushed to the hospital because he was getting drowsy and told the police he had taken sleeping pills; his stomach was pumped and revealed that he had in fact taken pills containing Scopolamine and Methapyrilene. Timmons remains in the hospital overnight and was returned the next day to police custody. At that time Timmons made a written statement to the police which described fully the sequence of events; this written statement was later introduced into evidence at trial and read aloud to the jury. The court below found that the record was ". . . silent as to whether either of the two detectives said anything to petitioner as to any right to counsel, or otherwise warned him that anything said by him could be used against him. We presume that nothing was said along these lines."

At trial Timmons pleaded not guilty by reason of insanity. Defense counsel permitted without objection the written confession to be introduced into evidence along with

slides of the two women after they had been shot. Counsel did object, without success, to showing photographs of the victims to the jury and, also without success, to enlarging the slides and projecting them for the jury on the ground that these were prejudicially inflammatory and not necessary to prove the state's case.[1]

Timmons was born in 1936, dropped out of school when he was sixteen, and had a nervous breakdown when he was twenty-three, two years before the events in question. At that time he shot himself and was then sent to a state mental institution in Maryland. He remained there two weeks, returned home for about three and a half months, and then went back in for about another month. His history at that institution revealed that he was "potentially dangerous." At trial defense counsel called the doctor who examined Timmons on the morning after the events in question. He testified that Timmons did not appear to him at that time psychotic. Defense counsel had never discussed the case with this witness. The witness, although he refused to express an opinion as to legal sanity, did testify that Timmons "was in reasonably good mental shape, not to require further psychiatric treatment. . . ." before being returned to police custody.

The chief witness for the defense was a well known and respected Norfolk physician who was a diplomated psychiatrist. He testified that he had made a thorough investigation and that in his opinion Timmons was psychotic when he committed the crime and had a history of four suicide

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[1] The prosecution argued to the jury that the accused man was a mad killer—that if his life were spared he would kill again and again; that he might be a little crazy but he knew the difference between right and wrong.

attempts.[2] Defense counsel did not contact the physician who had originally put Timmons in a state institution in Maryland because he had moved and counsel did not have his address, and also because that doctor was not a psychiatrist. Subsequently different counsel located the doctor and received a letter from him stating that "Mr. Timmons was definitely insane while under my care." Two psychiatrists testified for the state. The official diagnosis by the two state psychiatrists, who had examined Timmons at the Southwestern State Hospital, was "a social disturbance, in addition, alcoholism, and also mild mental deficiency." These two psychiatrists estimated that Timmons had received about eight hours of individual attention by the doctors during his two months at the hospital. Dr. Blalock, the superintendent of the asylum, one of the state's witnesses, testified that he had not examined Timmons personally except at the staff meeting when the diagnosis was made. He conceded that his institution was very much understaffed; that Timmons was one of two hundred maximum security patients under the direct supervision of Dr. Nemeth, the other expert witness for the state. He stated that in his opinion Timmons knew the difference between right and wrong and had the power to choose the right at the time he committed the offense.

Timmons' contentions before this court may be reduced to two basic arguments: (1) that his Fourteenth Amend-

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[2] The first defense psychiatrist diagnosed Timmons as "schizophrenic reaction undifferentiated type; catatonic." The second psychiatrist as "schizophrenic reaction chronic undifferentiated type." No explanation is offered to explain why counsel called the first psychiatrist without previously discussing the case. Presumably he had seen the doctor's diagnosis and assumed from that that he would testify to insanity. We think it a fair inference from the record that the doctor's unfavorable testimony applied to Timmons' appearance the day he left the hospital and that he refused to give an opinion on legal sanity because he had no opportunity to make an adequate examination.

ment right to due process was violated in that he was denied the right to counsel at critical stages in his pretrial procedure, and (2) ineffectual counsel. Both the state habeas court and the district court found that his representation at trial was competent, and we cannot say that this finding was clearly erroneous.

We think that the denial of counsel to the petitioner for a period of three and one-half months following the offense, during the first 60 days of which time the state for all practical purposes held him incommunicado, was a violation of the petitioner's Sixth Amendment right to counsel during critical pretrial proceedings which materially affected the outcome of his trial. *Powell* v. *State of Alabama,* 287 U.S. 45 (1932); *White* v. *Maryland,* 373 U.S. 59 (1963). In considering this question, we must keep in mind the following chronology of events: The killing occurred on October 19, 1961. The confession was taken by the police on October 20, 1961. On October 24, 1961, the petitioner was served with notice of the motion to have him committed to Southwestern Hospital, a state institution for the criminally insane. On October 25, 1961, the commitment order was signed. On December 20, 1961, Dr. Blalock, the superintendent of Southwestern Hospital, reported that the petitioner was competent to stand trial. On December 27th Dr. Blalock further reported that in his opinion the petitioner was sane at the time of the commission of the offense, pointing out that he had overlooked this request in the order when his original report was made. On January 20, 1962, the petitioner, on advice of the police, waived a preliminary hearing. On February 1, 1962, counsel was appointed. On February 5, 1962, an indictment was returned by the grand jury.

We hold that the preparation of the defense may not without violation of due process be postponed indefinitely

until the state has completed its case. We do not hold that an accused is entitled to have a lawyer present when he is undergoing psychiatric tests to determine his competency to stand trial or his sanity. That is not the question here where this petitioner was held by the authorities for sixty-one days—during which he received a maximum of only eight hours personal attention. We think the preparation of his defense could and should have been allowed to proceed concurrently with the state's. Furthermore, there is no reason to assume that reputable counsel and psychiatrists could not cooperate in the administration of tests and the necessary factual investigations of the patient's background to verify or refute his own statements.

On October 24, 1961, while defendant was confined in the city jail, notice of hearing to determine whether he should be committed to the state insane asylum was served on him. The commitment was made on motion of the state's attorney requesting that he be examined not only to determine if he was competent to stand trial as required by statute (Virginia Code of 1950, § 19.1-228) but also to determine if the defendant was sane at the time of committing the offenses for which he had been arrested. The statute does not authorize the latter determination. The defendant, who was indigent and mentally deficient, was neither present at the hearing nor represented by counsel. The next day he was sent to the state asylum where he remained for two months.

First, we note that the petitioner himself was not present at the hearing.[3] This court has heretofore held that the

[3] The petitioner has testified that he continuously asked for counsel from the time of his arrest. This testimony was contradicted in some instances. Even when it stands uncontradicted the state habeas court refused to credit it. Had the petitioner been present, request for counsel might have been honored.

Virginia statute (§ 19.1-240) requiring the presence of the accused at every stage of his trial is merely declaratory of a common law right, and his absence at any critical stage a violation of his constitutional right. *Near* v. *Cunningham,* 313 F. 2d 929 (1963). In 1965 the Virginia legislature passed § 19.1-241.1 guaranteeing every person accused of a felony the right to representation by counsel at every stage of any proceeding against him based upon such a charge "held in any court in this state." We disagree with the district court's opinion that this statute granted new rights to an accused not already embodied in the Sixth Amendment to the Constitution and by the Fourteenth Amendment made applicable to the states. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).[4] We think the argument that the presence of a defendant at a civil commitment is not required presumably because the proceeding might confuse and harm the defendant, is not pertinent in this case, especially in view of the fact that the DePaul Hospital at Norfolk, where the defendant had been sent for a preliminary examination, had returned him to police custody with the report that he was in reasonably good mental shape and did not require further psychiatric treatment before being released to police custody. Furthermore, in a civil case the defendant is entitled by statute to have counsel present during the hearing to defend his rights. Counsel here could have pointed out to the court that the Virginia statute did not authorize the petitioner's commitment to test his sanity at the time of the offense but only to test his capacity to stand trial. One does not have to be a medical expert to know that the more closely to the time of the offense an examination of an ac-

[4] The statute (Virginia Code of 1950 § 19.1-228) provides for the examination of a person "charged with crime," thus manifesting in its context that it is a part of the accusatory process and thus under *Gideon* counsel is then necessary.

cused's mental condition can be made the more trustworthy the report. Thus in this case, wherein it was obvious to the state from the very outset that the only possible defense was insanity, the petitioner was held in official custody for more than three and one-half months until the state had completed all aspects of its evidence and preparation for trial before petitioner was permitted the benefit of counsel.

Lending strength to the petitioner's contention that his defense was crippled and due process denied by this delay is the fact that the trial court denied a motion to make available the records at the state asylum in order to permit defense's expert psychiatric witness to examine them. Thus defense was unable to prepare any cross-examination of the state's experts with the aid of his own experts. The state's experts admitted on cross-examination serious shortages of professional and investigatory staff. In spite of an effort on the part of defense counsel, the record reveals no adequate cross-examination of the state's expert witnesses, notwithstanding the glaring discrepancy between the diagnosis of the defense's experts and that of the state's. Certainly, a jury of laymen in search of the truth as to the petitioner's mental status is entitled to more than the naked confrontation of two such diverse diagnoses.

We think, finally, that the strongest reason supporting our holding that the defendant was denied due process by being delayed for over three and one-half months in the preparation of his defense while the state was actively seeking evidence to convict, is the fact that under Virginia law the burden of proof rests upon a defendant who pleads insanity. Indeed we feel that this case is a classic example of the prejudice which is caused by this rule. Given the sickening and appalling nature of the facts of Timmons' crime, his

mental history, his low mentality,[5] and the strong testimony of a psychiatrist that he was insane, there is little doubt that a jury would have found that a reasonable doubt existed as to his sanity. Due to concessions made in the brief on direct appeal this issue was not before the Supreme Court of Appeals of Virginia. It is regrettable that that court did not have an opportunity to review its holding on this point. The Virginia rule was first laid down in *Boswell's* case, 61 Va. (20 Gratt.) 860 874-876 (1871), and was reiterated in *Christian* v. *Commonwealth,* 220 Va. 311, 117 S.E.2d 72 (1960), and *Jones* v. *Commonwealth,* 202 Va. 236, 117 S.E.2d 67 (1960). We recognize the fact that the Supreme Court in 1952 in the case of *Leland* v. *Oregon,* 343 U.S. 790, has upheld an Oregon rule requiring the defendant to prove insanity beyond a reasonable doubt. We feel bound by this decision, although we seriously doubt if it would be upheld by the present court.

The district court has discredited the petitioner's assertions that he requested counsel on two occasions before his trial: first, when he was questioned and confessed at the police station the day following the offense, and second while he was confined at Southwestern for sixty-one days. Finally, the court found that he had "probably requested counsel" the day before his preliminary hearing on January 20, 1962. The court considered each of these instances separately and concluded that even had he requested counsel, no harm was done by denial. Without considering the application of *Escobedo* to the confession, we cannot agree with the habeas

[5] The state psychologist who administered the Wechsler Adult Intelligence Scale Form test reported Timmons' I.Q. score as: Verbal score 74, Performance score 69, and full score 70. In lay language Timmons was of extremely low intelligence bordering on mental retardation. He would be considered barely able to function outside of a specialized institution—not educable in an ordinary school, and rated in the lowest 2½% of the population.

court's conclusion. We think that the cumulative effect of the state's conduct constituted a denial of the petitioner's Fourteenth Amendment right to due process and his Sixth Amendment right to counsel under the rationale of the Court's decision in *Crooker* v. *State of California,* 357 U.S. 433 (1958). In *Crooker* the special circumstances did not exist which would have caused the Court to set aside the judgment. Here we are dealing with a defendant of near moronic capacity who had twice been confined in an institution for the feeble-minded, whose heinous crime with no apparent motive leaves one with the conviction that the petitioner is not a proper subject for execution. We cannot agree with the district court, which "expresses no independent view as to the sanity of the petitioner" that the moral question of executing a person of petitioner's mentality is for the executive branch. When the state has marshalled all its forces against such creatures as the petitioner and has convicted a man who is in law insane by denying him a fair opportunity to carry his very heavy burden of proof, he has been denied "due process" under the Fourteenth Amendment. In the eloquent dissenting words of Mr. Justice Frankfurter in *Leland* v. *Oregon,* 343 U.S. 790 (1951):

> "But a muscular contraction resulting in a homicide does not constitute murder. Even though a person be the immediate occasion of another's death, he is not a deodand to be forfeited like a thing in the medieval law. Behind a muscular contraction resulting in another's death there must be culpability to turn homicide into murder."

We, therefore, reverse the district court and remand with instructions to issue the writ unless the state will retry him within a reasonable time, affording him a fair opportunity to test the issue of sanity at the time of the offense.

Reversed and Remanded.